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No. 94-624

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,
Petitioners,

v.

DONALD M. HALPERIN, Commissioner of the New York State Division of Housing and Community Renewal, and THE CITY OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

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PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THE GROUNDLESSNESS OF THE STATE COURT'S DISMISSAL OF THIS CASE IS BEST ILLUSTRATED BY RESPONDENTS' ATTEMPT TO DEFEND IT, SINCE THEY FAIL TO OFFER EVEN A SINGLE AUTHORITY TO SUPPORT THEIR ARGUMENTS

In defending the New York State Court of Appeals' dismissal of this case, the approaches taken by the State and by New York City have one overriding feature in common—a total absence of supporting citations. The State argues that

> "petitioners brought this declaratory judgment action solely to prohibit the State from implementing its regulations. They never suggested that they were seeking damages. . . .
>
> ". . . Their attempt to preserve this case by belatedly raising the possibility that they are entitled to damages . . . should be rejected." State, Brief in Opposition (Opp.) at 7.

The City makes the same argument, claiming that "petitioners sought only a judicial declaration of the statutes' unconstitutionality; petitioners never sought damages." City Opp. 3.

One would expect arguments such as these, involving allegedly improper pleading, to be accompanied by a host of cited authorities on New York procedure. But in fact neither respondent cites so much as a single court decision, statute or court rule. The reason for this is clear—they have no support.

The Dawsons expressly sought a judicial declaration that they had suffered a "taking of [their] property . . . without just compensation", together with "such other and further relief as [the] court may deem just and proper." Verified Complaint (Aug. 29, 1990) at 14, 16, Reply Brief App. 2a, 3a. New York case law clearly demonstrates what common sense suggests—that a declaratory judgment in the Dawsons' favor would *in itself* open the door to their pursuing damages, either upon remand in their original action "as an incident to the primary relief" sought,[1] or in a subsequent action in the New York State Court of Claims.[2] This case thus continues to satisfy

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[1] *Burke v. Crosson*, 152 Misc.2d 158, 162, 575 N.Y.S.2d 624, 627 (Sup. Ct., Onan. Cty., 1991), *aff'd*, 191 A.D.2d 997, 595 N.Y.S.2d 272 (4th Dept. 1993).

[2] The latter route is illustrated by one of New York's major temporary takings cases, in which a six-month statutory delay in the issuance of a demolition permit was held to constitute a taking. *Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185

New York's essential criterion for such actions—namely, "that a declaratory judgment would be useful." *Corso v. Nasser*, 42 A.D.2d 822, 822, 345 N.Y.S.2d, 793, 793-94 (4th Dept. 1973). In short, the Dawsons are as much entitled to a declaratory judgment now as they were when their tenants were still in residence.

In light of *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987), and of New York's own case law on temporary takings,[3] the respondents' alleged surprise over the issue of damages demonstrates the depth of their obliviousness to takings jurisprudence. Like the police captain in *Casablanca*, who is "shocked, shocked" when informed of gambling in Rick's Cafe, the respondents are "shocked, shocked" at the prospect of liability if they are found to have engaged in a taking. They do protest too much.

II. RESPONDENTS' TREATMENT OF THE MERITS DEMONSTRATES THE NEED FOR A RULING FROM THIS COURT

Respondents' arguments on the merits fare no better. The State characterizes the Dawsons as having been "only temporarily limited from withdrawing two units from the rental market", and therefore supposedly beyond this Court's proscription of tenancies compelled "in perpetuity". State Opp. 11; *Yee v. City of Escondido*, 112 S. Ct. 1522, 1529 (1992). But the fact that the Dawsons succeeded in *paying* their tenants to leave does not change the permanent nature of the legal compulsion imposed on them. One can scarcely conceive of a compulsory tenancy that could not be ended by a sufficiently large cash payment. That the Dawsons finally decided to pay this "ex-

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(1966). The declaratory judgment issued in that case enabled the property owners to subsequently seek and, fourteen years later, win damages in the State Court of Claims. *See Keystone Associates v. State*, 107 Misc.2d 169, 433 N.Y.S.2d 695 (Ct. Cl. 1980).

[3] *See* note 2, above.

tortion" in no way absolves the State. *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987) (citations omitted).[4]

The State offers a rote recitation of the host of cases which uphold rent control's general validity, while refusing to deal with the specifics of the Dawsons' dilemma. State Opp. 7-9. This obstinacy reaches its peak in the State's attempt to rely on *Bowles v. Willingham*, 321 U.S. 503 (1944). *Id.* at 8 n.5. As discussed in detail in the petition for certiorari, in *Bowles* this Court *recognized* the right of a rent-controlled landlord to cease renting; *Bowles* and its companion cases are thus directly at odds with the Appellate Division decision in *Dawson*. Pet. 3, 14-16. But in the respondents' view, this merits no response at all; instead, they simply invoke the talisman of rent control's general validity.

The right to exclude, in the words of this Court, "cannot be so easily manipulated." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). Nor can it be so easily buried.

As to the conflict between the Appellate Division decision and those of the Washington and Massachusetts high courts, the State does deign to acknowledge, in a footnote, that the latter cases overturned "restrictions on an owner's ability to take his property off the rental market and occupy it for his own enjoyment." State Opp. 14 n.7, *citing Polednak v. Rent Control Board of Cambridge*, 397

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[4] The Appellate Division held that one way in which the Dawsons could supposedly terminate their tenancies was through a showing of financial hardship. *Dawson v. Higgins*, 610 N.Y.S.2d 200, 206 (1st Dept. 1994), Pet. App. 9a-10a; *see* Pet. 12-13 & n.7. In their briefs to this Court, both respondents now state that the Dawsons "cannot demonstrate economic hardship." State Opp. 12 n.6; *see also* City Opp. 6. The respondents characterize this as a concession on petitioners' part (*id.*; City Opp. 5), but in fact this point only further demonstrates that the Dawsons had no way out of their predicament.

Mass. 854, 494 N.E.2d 1025 (1986); *Kennedy v. City of Seattle*, 94 Wash.2d 376, 617 P.2d 713 (1980); *Granat v. Keasler*, 99 Wash.2d 564, 663 P.2d 830 (1983); *see* Pet. 16-17. But its response is one of self-serving circularity:

> "Nevertheless, in none of these cases did the court even suggest that under *reasonable* circumstances, such as where the tenants are elderly or otherwise long-standing occupants, the government could not prevent the eviction of tenants by an owner seeking to occupy the premises. Rather, in each of the cases cited by petitioners, the law was struck down because of a unique factor which placed *unreasonable* limits on the owner." State Opp. 14 n.7 (emphasis added).

The State points to nothing in these cases that even suggests a different outcome if the tenants at issue had been "elderly or otherwise long-standing". Instead, all it offers is the bare assertion that New York's law is "reasonable" while those involved in the other cases were "unreasonable".

Conflicting cases cannot be distinguished by *ipse dixit*. Joan Dawson's reliance on existing New York owner-occupancy law in buying her house was identical to the "reasonable belief" and "primary expectation" of the property owner in *Polednak*. 397 Mass. at 861, 494 N.E.2d at 1030. The nonterminable occupancy rights that the State subsequently bestowed on her tenants were even more restrictive than the houseboat owners' rights that were overturned in *Kennedy* and *Granat*. In the latter cases, the moorage owners at least had the theoretical, though impractical, option of relocating the houseboat owners. Joan Dawson did not have even that.

The respondents' agility in skirting these decisions, in avoiding *Yee*, and in totally ignoring this Court's ruling in *Bowles*, has implications that go beyond the instant case. This Court has issued a series of rulings on takings by physical occupation. These rulings are being ignored,

successfully, by rent control agencies. Their application to rent control needs to be made explicit.

In the words of one legal scholar, rent control can have "extraordinary impacts on ordinary people".[5] Not all of these impacts may be compensable, but what the Dawsons have suffered is. Even if their plight in itself does not warrant this Court's attention, the need for some bright-line ruling in this area does.

CONCLUSION

For these reasons, and for the other reasons previously set forth, a writ of certiorari should issue to review the order of the New York State Court of Appeals.

Respectfully submitted,

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December 16, 1994

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[5] Lochhead, *Live-in Nightmare on Dream Street*, INSIGHT, Feb. 26, 1990, at 22, 23 (quoting R. Epstein).

APPENDIX

APPENDIX

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. ———

JOAN DAWSON, PAUL DAWSON and TANDRA DAWSON,
Plaintiffs,

-against-

RICHARD L. HIGGINS, Commissioner of the Housing and Community Renewal, and FELICE MICHETTI, Commissioner of the Department of Housing Preservation and Development of the City of New York,
Defendants.

VERIFIED COMPLAINT

PLAINTIFFS, Joan Dawson, Paul Dawson and Tandra Dawson, by their attorneys, Ronald D. Hariri, ABADY, JAFFE & HARIRI, as and for their complaint herein, allege as follows:

* * * *

RELIEF REQUESTED

WHEREFORE, plaintiffs request that this Court determine, construe and declare the legal rights and regulations of the parties hereto with respect to the legality, validity and constitutionality of Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations, and issue judgment declaring that:

a. On the first cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section

2204.5(a) of the Rent Control Regulations constitute and/or result in a physical taking of plaintiffs' private property by the government without just compensation, in violation of the Takings Clause of the Fifth Amendment to the United State Constitution.

b. On first cause of action, that Section 26-408 (b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in physical taking plaintiffs' private property by the government without just compensation, in violation of the Takings Clause of Article I, Section 7 of the New York State Constitution.

c. On the second cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in regulatory taking of plaintiffs' property by the government without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

d. On the second cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in a regulatory taking of plaintiffs' private property by the government without just compensation in violation of the Takings Clause of Article I, Section 7 of the New York State Constitution.

e. On the third cause of action, that Section 26-408 of the Rent Control Law and Section 2204.9 of the Rent Control Regulations constitute and/or result in a form of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

f. On the fourth cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

g. On the fourth cause of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations constitute and/or result in a violation of the Due Process Clause of Article I, Section 6 of the New York State Constitution.

h. On the first, second, third and fourth causes of action, that Section 26-408(b)(1) of the Rent Control Law and Section 2204.5(a) of the Rent Control Regulations are, by virtue of their unconstitutionality, null and void and of no effect.

i. For such other and further relief as this court may deem just and proper.

Yours, etc.,

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Dated: New York, New York
August 29, 1990